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June 26, 2003

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: Fitchburg Gas and Electric Light Company, D.T.E. 03-9

Dear Secretary Cottrell:

On March 21, 2003, the Department commenced an investigation into the business relationship between Fitchburg Gas and Electric Light Company (“Fitchburg” or the “Company”) and Enermetrix, Inc. (“Enermetrix”), an internet-based energy auction company. The Department’s investigation focuses on whether Enermetrix is an affiliate of Fitchburg and, if so, whether Fitchburg adhered to the relevant statutes and regulations in its business dealings with Enermetrix. On April 18, 2003, Fitchburg filed Initial Comments arguing that it was not an affiliate of Enermetrix and that it should not be assessed a penalty under any circumstance.¹ The record evidence contradicts the Company’s claims and demonstrates that Enermetrix is an affiliate of Fitchburg and that Fitchburg failed to adhere to affiliate transaction laws and regulations in its business dealings with Enermetrix. In light of Fitchburg’s violation of the affiliate transaction laws and regulations, the Department should assess an appropriate penalty against Fitchburg and also order the Company to refund to customers the \$19,126 brokering fee that customers indirectly paid to Enermetrix in connection with the affiliate transactions.

I. BACKGROUND

The circumstances surrounding the affiliate transactions are relatively straightforward. In

¹ The Company argues that it is not an affiliate of Enermetrix because its minority shareholder interest (~ 10%) and one Board seat with no extraordinary voting power is insufficient to allow it to exert substantial control over Enermetrix. Comments, pp.1, 6. The Company further argues that, even if the Department finds that it is an affiliate of Enermetrix, the Department should not assess a penalty against it because, among other things, its interpretation of the law was reasonable and in good faith and customers benefitted from the transactions. Comments, pp. 1, 9-10.

September, 2001 and March, 2002, the Company engaged Enermetrix to broker its default service solicitations. In connection with these two default service solicitations, power suppliers bid on Fitchburg's load requirements on Enermetrix's energy auction website and Fitchburg awarded power contracts to the winning bidders. Enermetrix charged suppliers with winning bids brokering fees totaling \$19,126 for Fitchburg's two default service procurements. At the time of the procurement transactions, Unitil Corp. ("Unitil"), Fitchburg's parent corporation, owned shares of stock in Enermetrix, held seats on Enermetrix's Board of Directors, and maintained an ongoing business relationship with Enermetrix through its unregulated subsidiaries Usource, LLC ("Usource") and/or Unitil Resources, Inc. ("Unitil Resources").

II. ARGUMENT

A. Enermetrix And Fitchburg Were Affiliates Under the Statute and Regulations.

Enermetrix and Fitchburg were "affiliates" as defined by the affiliate transaction statute and the Department's regulations. The affiliate transaction statute and the regulations define affiliate status in terms of control or the absence of equal bargaining power. *See Boston Edison Company*, D.P.U./D.T.E. 97-63, at 52, n. 16 (1998). The Department's regulations, 220 CMR §12.02, provide in relevant part that the term "affiliate" "refers to any 'affiliated company' as defined in M.G. L. c 164 § 85...or any separate legal entity either ***owned or subject to the common control of*** the Distribution Company or ***its parent***."(emphasis added). The statute, G.L. c. 164 § 85, provides in pertinent part "the words 'affiliated company' shall include any corporation, society, trust, association, partnership or individual (a) controlling a company subject to this chapter either directly, by ownership of a majority of its voting stock or of such a minority thereof as to give it ***substantial control*** of such company, or indirectly by controlling such company; or (b) ***so controlled by a corporation, society, trust, association, partnership or individual controlling as aforesaid, directly or indirectly, a company subject to this chapter***; or (c) standing in...an ***absence of equal bargaining power***...."(emphasis added).

Fitchburg and Enermetrix were affiliates under the statute and regulations during the time of the procurement transactions because Unitil, Fitchburg's parent corporation, exercised authority and control over Enermetrix both directly and indirectly through its subsidiaries. *See* 220 CMR §12.02 (affiliate status where there is control by parent of distribution company). Unitil's authority and control over Enermetrix is evidenced in the various ties and connections Unitil held with the company and the business deals that emerged from those ties and connections.

First, Unitil exercised substantial control over Enermetrix through its voting power on Enermetrix's Board of Directors.² From 1999 through 2002, Unitil held 1 or 2 seats out of a total

² Despite Unitil's minority shareholder stake in Enermetrix (~10%), the Company was nevertheless able to wield substantial influence and decision-making power through its seat(s) and voting power on the Board of Directors. *See Bay State Gas Company*, D.P.U. 92-68, at 31-32 (1993)(17.5 % ownership interest satisfied affiliate threshold); APB Opinion No. 18, ¶ 17 (1971)(equity method acceptable even if investor holds 50% or less of voting stock where investor is able to exercise

of 6 to 10 seats on Enermetrix's Board of Directors. Exh. AG-1-18, AG-1-19; Tr. pp. 60-61. As of January 29, 1999, Unitil held 2 of 6 seats on the Board of Directors and was entitled to cast 1 of 3 votes, constituting 33% of the voting power in the Board's business decision-making.³ Exh. DTE-1-7, Attachment 1-7(1), p. 16; Exh. AG-1-18; Tr. p. 52. Unitil referred to its membership on the Board of Directors as a "strategic board seat" and testified through Company witness Brock that Enermetrix's Board of Directors voted on and approved strategic and significant items. Exh. DTE-1-7, Attachment 1-7(1), p. 22; Exh. AG-1-22; Tr., pp. 77, 133-134; *see also* APB Opinion No. 18, ¶ 17 (1971)(minority shareholder investor's ability to exercise significant influence over operating and financial policies of investee may be indicated by representation on board of directors, participation in policy making process, material intercompany transactions, interexchange of managerial personnel, or technological dependency).

Second, Unitil exercised substantial control over Enermetrix through management personnel. Mr. Daly served as Vice President of Unitil Service Corp. for approximately seven years from 1993 until 2000. Tr. pp. 41-42. During his tenure as Vice President of Unitil Service Corp., Mr. Daly served on Enermetrix's Board of Directors. Exh. AG-1-7. In 2000, Mr. Daly left the Unitil system of companies and became Vice President of Enermetrix.⁴ Mr. Daly's presence on Enermetrix's Board of Directors benefitted Unitil and provided Unitil access, influence and control in the policies and decisions of Enermetrix. *See* APB Opinion No. 18, ¶ 17 (1971)(minority shareholder investor's ability to exercise significant influence over operating and financial policies of investee may be indicated by representation on board of directors, participation in policy making process, material intercompany transactions, interexchange of managerial personnel, or technological dependency).

Third, Unitil and its subsidiaries have not dealt with Enermetrix at arms' length, further evidence of Unitil's substantial control over Enermetrix and also evidence of a lack of equal bargaining power. From 2000 through 2001, Usource and Enermetrix engaged in joint advertising and web and software development projects. Exh. AG-1-14. Usource paid the total costs of the projects up-front and Enermetrix subsequently reimbursed Usource \$118,794.08 for

significant influence over operating and financial policies of investee).

³ It is difficult to ascertain the exact number of seats and voting power allocation on Enermetrix's Board of Directors for any date other than January, 29, 1999, because the Company's documents are ambiguous regarding certain contingencies in the total number of seats if Enermetrix's co-founder Mr. Gaus serves or does not serve as CEO as well as the voting allocation per Board member. *See* Tr., pp. 56-57, 61-66, 69-72; RR-AG-3-B, p. 3, RR-AG-3-C, p. 2, RR-AG-3-D, p. 4.

⁴ Mr. Daly was able to leave Unitil and become an executive of Enermetrix immediately or within the same year of departure without being subject to a covenant not to compete. Tr. p. 42. Unitil derived a benefit from having Mr. Daly serving as Vice President of Enermetrix. Indeed, Mr. Daly's departure from Enermetrix as Vice President coincided with the period surrounding Unitil's stock divestiture from Enermetrix. Exh. FGE-1, p. 6; Exh. AG-1-7; Tr., p. 42. The Company has provided no explanation or documentation regarding these circumstances.

Enermetrix's share of advertising costs and \$143,000 for Enermetrix's share of web development costs. Exh AG-1-14, Attachment AG-1-14, p. 1; Tr. p. 91-93.⁵ The Company provided no reasonable explanation for this particular arrangement. Tr. pp. 92-93. From 1999 through 2002, Usource and Unitil Resources, paid or otherwise transferred to Enermetrix approximately \$986,000. Exh. AG-1-15, Attachment AG-1-15, p. 1. The bulk of this amount was the questionable payment of \$700,000 by Usource to Enermetrix for a customer list similar to one Usource purchased from Duquesne Enterprises, Inc. for only \$10.00. Exh. AG-1-13, AG-1-15, Attachment AG-1-15, p. 1; Exh. AG-1-21, Attachment AG-1-21-1, pp. 38-39. The Company provided no reasonable explanation for this business arrangement and the resulting discrepancy in the amount paid for the two customer lists.⁶ From 1999 through 2003, Enermetrix as licensor and website manager paid or otherwise transferred to Usource as licensee and website member approximately \$669,000 for alleged energy brokering transaction fees. Exh. AG-1-14. The exact nature and scope of the payments are questionable.⁷ Unitil and its subsidiaries entered informal non-written agreements for business matters that are typically maintained in formal and in written form. Tr., p. 103, 107-110. Unitil acquired a franchise business from Enermetrix that included a salesforce, office space, and equipment; however, the Company testified that this franchise business was not an actual franchise, and thus, did not have any formal franchise documents. Tr., pp. 126, 144-145. The Company admitted to irregular recordkeeping by claiming that it recorded or otherwise listed the franchise-like business as a "customer list." Exh. AG-1-15; Tr., pp. 126, 144-145. The Company negotiated and entered an agreement with Enermetrix without knowing what fee Enermetrix would charge. Tr. pp. 116-117. The Company did not have certain documents or amended documents that are typically part of any routine business recordkeeping. Tr. pp. 88-91.

Finally, characterizations in Unitil's own documents support finding an affiliate relationship here. By letter dated March 26, 1999, Unitil informed the Department that it

⁵ Unitil also obtained a perpetual software license and a right of first refusal relating to the software internet site as a condition of its divestiture. Exh. AG-1-4.

⁶ The Company attempts to explain the high \$700,000 price paid for Enermetrix's customer list by suggesting that the payment included the price of a franchise-like business it had acquired from Enermetrix. Tr., pp. 126, 144-145. Nothing in the record supports the explanation that the franchise was part of the customer list price. *See* Exh. AG-1-15.

⁷ This business arrangement resembles a revenue-sharing partnership. *See* Exh. DTE-3-6, DTE-1-7, Attachment 1-7(1), p.22; Tr. pp. 85-87. Further, the time frame of the payments includes the period of Fitchburg's default service solicitation. The payments may be connected to the terms of Unitil's software license agreement with Enermetrix which require Unitil to "ensure at least 10 active electric and 10 active gas suppliers bidding on loads" and the \$19,126 brokering fee. Exh. DTE-1-7, Attachment 1-7(1), p. 5. The Company contends this requirement provision is a "typo" but is unable to provide an amended license agreement correcting this alleged error. Tr., pp. 88-91. Further, the Company has submitted no documents showing that it or Unitil companies did not benefit directly, indirectly or "in kind" from the Enermetrix transactions.

planned to acquire an 11% ownership interest in Enermetrix and admitted that “[a]s a result of this transaction, Concord Electric Company, Exeter & Hampton Electric Company and Fitchburg Gas and Electric Light Company will become *associate* companies....” of Enermetrix. (emphasis added). Exh. AG-1-1, Attachment AG-1-1(1), p. 1. Further, Unitil refers to the Enermetrix software license held by Unitil Resources as well as its Shareholders Agreement with Enermetrix as “**Affiliate Agreements.**” Exh. AG-1-21, Attachment 1-21-1, p. 43; *see also* RR-AG-3-C, p. 3, RR-AG-3-D, p. 5. The terms “affiliate” and “associate” are terms of art. When an entity of Unitil’s size and sophistication uses these terms to describe its relationship with Enermetrix, this evidence supports the inference or conclusion that Unitil and its subsidiaries are affiliates of Enermetrix.⁸

B. Fitchburg Violated The Affiliate Transaction Statutes And Regulations.

The affiliate transaction statutes and regulations impose notification and various filing and reporting requirements upon utilities to allow effective supervision and ensure fair dealing in these transactions. *See* G.L. c. 164, §§ 76A, 85A, 94B; 220 C.M.R. §12.00 *et. seq.* Fitchburg has the burden of proof to establish the reasonableness of any payment, contract, obligation or other arrangement regarding Enermetrix. *See* G.L. c. 164, § 94C. Fitchburg failed to adhere to the affiliate transaction statutes and regulations with respect to the two procurement transactions. Fitchburg violated the affiliate transaction statutes and regulations by failing to notify the Department of its affiliate relationship with Enermetrix.⁹ Fitchburg violated G.L. c. 164, § 76A by failing to make periodic reports with the Department of its affiliate relations, transactions and dealings with Enermetrix to allow effective supervision. *Western Massachusetts Electric Company*, D.T.E. 97-120-D, at 6-7 (1999). Fitchburg violated G.L. c. 164, § 85A by failing to file with the Department a written copy of its solicitation agreement with Enermetrix or, in the case of an oral agreement, a written statement of all the terms of that agreement. Fitchburg violated G.L. c. 164, § 94B by failing to obtain Department approval of its solicitation agreement with Enermetrix.¹⁰ *See, e.g., Western Massachusetts Electric Company*, D.T.E. 97-120-D, at 6-7 (1999). Finally, Fitchburg violated Department regulations, 220 C.M.R. §12.03(3) and 12.03(8), by giving preference in its selection of Enermetrix because of Unitil’s obligation to ensure active

⁸ Unitil is represented by legal counsel at a law firm with a well-established utility practice.

⁹ Although Unitil notified the Department by letter in March, 1999, of its ownership interest in North American Power Power Brokers, Inc. (renamed Enermetrix), Company witness Foote testified that this letter would not and does not put the Department on notice of Unitil’s interest in Enermetrix for purposes of the October, 2001, and April, 2002, solicitations. Tr., pp 39-40.

¹⁰ This statutory provision requires that there be a contract in excess of one year and that there be compensation paid in whole or in part by the utility for services rendered by the affiliate. The affiliate agreement at issue is the non-written agreement with Enermetrix which lasted longer than one year--- not the six-month power supply contracts. Exh. AG-1-1; Exh. DTE-2-8 (affiliate agreement commenced in the summer of 2001 and ended in the fall or winter of 2002). The compensation paid is the \$19,126 fee that was ultimately passed on to consumers along with the payment in kind of ensuring active supplier bids to fulfil Unitil’s obligations. *See* Comments, p. 4; Exh. FGE-3, p. 6.

supplier bids and by tying or conditioning Enermetrix's selection on Unitil's obligation to ensure supplier bids.

The Company emphasizes the point that customers allegedly benefitted from the two affiliate transactions. Exh. FGE-3, pp. 8-9; Tr., pp. 31-32. The issue, however, is not whether Fitchburg's gamble in using Enermetrix without proper notification or approval benefitted or harmed customers. Instead, the issue is whether Fitchburg violated the statutes and regulations, which the record evidence demonstrates that it did. The Department should not allow Fitchburg to flout statutory protections for consumers. The fact that consumers may have benefitted from the prohibited transactions does not rectify the Company's misconduct. Accordingly, the Department should assess a penalty against Fitchburg for violating the affiliate transaction statutes and regulations. Assessing no penalty would reward the Company's conduct by condoning violation of the statutes and regulations. In determining an appropriate penalty to assess against the Company, the Department should consider Fitchburg's lack of candor and good faith to the Department in this matter.¹¹ Department regulations provide for a penalty not to exceed \$25,000 per violation, per day, not to exceed \$1 million dollars in total. 220 C.M.R. § 12.05; G.L. c. 164, § 1F. This is not the first time that the Company has failed to comply with the Department's regulations. Nor is this the first time the Company has addressed the Department with less than complete candor. *See, e.g., Fitchburg Gas and Electric Light Company*, D.T.E. 02-24/25 (2002); *Fitchburg Gas and Electric Light Company*, D.T.E. 99-66-A (2001). Accordingly, the Department should assess an appropriate penalty against Fitchburg and also order the Company to refund to its customers the \$19,126 brokering fee.

Respectfully submitted,

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¹¹ The Department may consider a company's lack of good faith in determining the size of a penalty. 220 C.M.R. § 12.05. Fitchburg:(1) failed to disclose its affiliate transactions with Enermetrix to the Department; (2) failed to disclose its franchise-like relationship with Enermetrix in its response to DTE-1-9, AG-1-14 and AG-1-15; and (3) failed to disclose that Mr. Daly left Unitil Service Corp to served as Enermetrix's Vice President. *Compare* DTE-1-10, AG-1-7.